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September 16, 1993

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BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

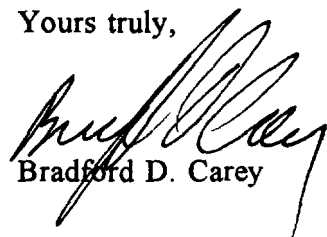
RE: In the Matter of Reexamination of the Policy
Statement on Comparative Broadcast Hearings
GC Docket No: 92-52
Comments of Tucker Broadcasting Company, L.P.

Dear Mr. Caton:

Enclosed please find the original and thirteen (13) copies of the Comments of Tucker Broadcasting Company, L.P. for filing with the FCC in connection with the above-captioned. Also enclosed is an additional copy to be date-stamped and returned to me in the enclosed self-addressed, stamped envelope.

If you should have any questions regarding this matter, please feel free to contact me at any time.

Yours truly,


Bradford D. Carey

BDC/mv
Enclosures

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Before the
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In the Matter of

Reexamination of the Policy Statement
 on Comparative Broadcast Hearings

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

GC Docket No:

92-52

To: The Commission

SUMMARY OF

COMMENTS OF TUCKER BROADCASTING COMPANY, L.P.

Tucker Broadcasting Company, Limited Partnership ("Tucker"),¹ by Counsel, hereby states its Comments in response to the *Further Notice of Proposed Rulemaking*, 58 *Fed. Reg.* 44484 (August 23, 1993) ("*Notice*") in this proceeding. There is no need (demonstrated or undemonstrated) for the proposed rules. Worse, the proposals threaten to eliminate any flexibility of the permittees of new stations to obtain financing. Minority entities, the needs of which the Commission has claimed to be specifically sensitive of, would, disproportionately, find the rules acting as additional (and unnecessary) barriers into the entry into broadcasting. Diversity of ownership of the media, one the Commission's primary goals in licensing procedures, would be thwarted.

¹Tucker is an applicant before the Commission for a Construction Permit. Moreover, this is a proposed rule of General Applicability. As a citizen, and as an applicant, Tucker has standing to file these Comments.

The Commission previously had a three year rule for all stations. Deletion of the rule resulted in the substantial additional capital becoming available for broadcasters. Imposition of a new three year rule on only new stations would cause the tight capital market for start-up facilities to dry up altogether. New stations could be started only by those who could self-finance the construction and operation.

The Commission must regulate in the public interest. Neither the interests of the receiving public nor those of broadcasters are served by the Commission forcing permittees of new stations to continue to own them for three years against their will. No additional rules should be adopted.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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To: The Commission

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¹Tucker is an applicant before the Commission for a Construction Permit. Moreover, this is a proposed rule of General Applicability. As a citizen, and as an applicant, Tucker has standing to file these Comments.

I. THERE IS NO EMPIRICAL JUSTIFICATION FOR ADOPTION OF THE PROPOSED RULE.

Neither the *Federal Register* summary nor the full text of the *Further Notice of Proposed Rulemaking* provide empirical data that demonstrates to what extent new station permits are assigned. Nor is there data provided as to the degree to which such assignments (or transfers of control) as have occurred merely reflect revisions to ownership structures and interests that would have occurred much earlier but for the effective "freeze" on applicant structures as of the deadline for amendment as of right of applications.

Absent presentation by the Commission in the *Notice*, of data that justifies the proposed rule, there is no reason to adopt the proposed rule. The statements² of the Commission that it "agrees with these parties that a longer mandatory holding period would significantly enhance the public interest benefits of the comparative process and at the same time protect it from abuse" is merely an unsupported conclusion.³

A. Comments And Data On File In Response To The Earlier Notice Are Outdated And Invalid Due To Other Structural Changes That Have Occurred.

The comments, on which the Commission claims to have based its

²See *Notice, supra* at 44485.

³It also suggests that the Commission has already determined to adopt the proposed rule and that the instant *Notice* is merely a *post hoc* white wash.

conclusion that a longer holding period would enhance the public interest benefits of the comparative process, were filed in response to a *Notice of Proposed Rulemaking in Reexamination of the Policy Statement on Comparative Broadcast Hearings* published April 22, 1992. At that time, the revised rules governing comparative broadcast hearings had only recently taken legal effect. Few, if any, applications that had been prepared and filed after the Commission adopted its rule change (limiting to reimbursement of the applicant's legitimate and prudent expenses the consideration that may be paid in return for dismissal of an application) had been designated for hearing at the time the earlier Comments were filed. And, given the application and hearing cycle delays, it is inconceivable that the applications for a single station that were filed after adoption of the payment limitations could have been litigated through the full hearing and appeals process prior to the filing of the earlier Comments.

It is clear, therefore, that the earlier Comments do not reflect the present circumstances and can not serve as the basis for the proposed rule.

B. The Prior Comments On Which The Proposal is Based Exceeded The Scope of the Earlier Proceeding and Need Not Have Been Challenged .

The earlier Comments were filed in response to a proposal to award a comparative preference to applicants proposing to commit to operate the station for three years. Apparently, some parties' comments went beyond the proposal, urging a mandatory three year holding period. Since such proposals were beyond the

scope of the earlier notice, they could not be adopted and there was no reason, and, at best, limited opportunity, for others to controvert such comments.⁴

II. A THREE YEAR HOLDING PERIOD WOULD LIMIT FINANCIAL RESOURCES AVAILABLE TO APPLICANTS AND PERMITTEES.

A. The Commission Wisely Determined to Eliminate A Previous Three Year Rule.

The Commission previously had a rule that required broadcast station licenses and permits be held for a period of three years from acquisition. Many stations were, and still are, held for much longer periods of time.

However, no one is compelled by the Commission to continue owning a broadcast station or permit.⁵ When the Commission eliminated its prior three year retention policy, it noted that the public interest is better served by the Commission approving assignment of the station's license to a new licensee who is anxious and eager to serve the community rather than to force a licensee to continue to operate the station against its will for an arbitrary period of time.

⁴Thus, the apparent pre-determination of the Commission to adopt the rules herein proposed is without benefit of the expression of contrary opinions.

⁵Even a licensee who has been accused of violating the Commission's rules and faces a hearing may seek to sell the station under various policies, including those of "minority distress sale" and *Second Thursday*.

B. The Dominant Factors Have Not Changed Since Repeal of The Prior Rule.

The Commission has not demonstrated that the facts, or public interest, has changed since it wisely deleted its former three year rule. The public interest will not be served any more now, than it was twenty years ago, by licensees being forced to continue to own and operate that which they would rather sell under the prevailing market conditions.

III. A MANDATORY THREE YEAR RULE WOULD REQUIRE APPLICANTS TO PERFECTLY PREDICT FUTURE BUSINESS CONDITIONS TEN YEARS IN ADVANCE!

Often, a licensee or permittee acquires or builds a station and everything goes well. The licensee realizes his dreams and the community is well served. In these cases, a three year rule is superfluous. The licensee, whether he acquired the station by purchase or through the construction permit / comparative hearing process, will probably want to continue to operate its station for a long time.

Sometimes, however, for whatever reason, things do go as it was hoped they would. Competition for program materials and / or listeners turns out to be harsher than expected. Sometimes, by the time the Commission's comparative hearing processes have been concluded -- or the parties can reach settlement -- many years have passed since the applications were filed. In the interim, additional broadcast stations may have been licensed, or existing stations may have increased their

power and "moved in" to the area. Sometimes, the area's economy has been reduced to a shadow of its former self between the date of filing of an application and the date of grant of a construction permit. The business climate that exists at the time the permit is granted often is quite different from that which existed at the time the station was applied for.

Moreover, the climate in which capital is raised or borrowed fluctuates wildly. No one can predict with accuracy today what conditions will exist in the capital markets three years from now. But, three years is only the holding period that is proposed.

If it is assumed that a permit is granted, and the grant of that permit becomes "Final" five years after the plans are made to seek a construction permit,⁶ and if it is assumed that the station is constructed and operations commenced eighteen months later, a three year holding period would have the effect of **requiring that the permittee not dispose of the station until nine and one-half years after the project was commenced!**⁷ The ability to foresee with certainty now what the capital markets and business conditions will be like in ten years is an attribute that few persons have.

⁶This is not an unrealistic estimate of the time for which some of the permits to be issued will have been contested. *See e.g. Charisma Broadcasting Corp.*, (appeals pending D.C. Circuit) regarding applications that were filed in 1984 and 1985 for an Arlington, Texas (Dallas market) U.H.F. permit.

⁷In some states, a felon sentenced to "life-time" may be eligible for parole in 7 years.

IV. ADOPTION OF A THREE YEAR RULE WOULD CAUSE MUCH OF THE AVAILABLE CAPITAL TO BE WITHDRAWN FROM THE MARKET.

Capital markets function on liquidity. Non-liquid assets are much more difficult for which to raise funds. The perfect example of this is the fact, well known to the Commission, that capital became much more available to broadcast licensees and permittees when the previous three year rule was dropped than it had been while the rule was in effect. The increased capital availability had direct impact on the ability of many stations to upgrade their facilities and programming.

V. A THREE YEAR RULE APPLICABLE ONLY TO NEW PERMITS WOULD BE DISCRIMINATORY AND SEVERELY LIMIT THE VIABILITY OF NEW STATIONS.

The adoption of a three year holding rule for permits would cause permittees to suffer the slings and arrows of non-liquidity that broadcasters suffered under the old three year rule, while licensees and buyers of existing stations would be able to buy and sell at will -- as they are able now to do. **The vast difference in liquidity between permits and existing stations would cause result in the loss of capital** available for permittees.⁸ Lenders would rather have their funds invested in stations not subject to arbitrary holding periods.

⁸It is difficult enough now to raise capital for start-up stations. The last thing that permittees -- or applicants -- need is for existing sources to be scared off by a new three year rule.

When the Commission previously had a three year holding rule, all stations were subject to it. Since only new stations would be subject to the proposed rules, capital sources would avoid new stations to retain liquidity. Only the most wealthy, who have the cash themselves, could afford to be permittees. What funds were available to borrow, would be lent at rates even higher than prevail now for start up stations! This increased burden on station resources would surely result in less funds being available for programming and public affairs operations. Of the stations that did get on the air, more would fail. All of this would be detrimental to the public interest.

**VI. MINORITY OWNERSHIP WOULD BE IMPACTED
DISPROPORTIONATELY.**

It is well known to the Commission, and the government of the United States of America as a whole, that minority owned and / or controlled enterprises have substantially more difficulty raising capital with which to start businesses than do enterprises owned by white Americans. The "drying up" of capital that the proposed rules would cause would adversely impact much more heavily the minority applicants and permittees that the Commission *says* it wants to help.

**VII. ADOPTION OF A THREE YEAR RULE WOULD UNDERCUT THE
MINORITY PREFERENCE IN VIOLATION OF FEDERAL LAW.**

It is the law of the United States of America, as passed by both houses of the Congress, and signed into law by the President of the United States of America⁹ that the Commission shall not spend any funds to alter the minority preferences as they have been granted in the past. A three year holding rule, impacting disproportionately on those who are minorities, would erode the minority preference. Because the proposed rules would have the result of lessening the value of the minority preference, they may not legally be adopted.

VIII. NO THREE YEAR RULE SHOULD BE ADOPTED.

As set forth above, the adoption of a three year holding rule would cause the capital available for new stations to dry up. Minority entities, which always face disproportionate difficulties in raising capital would be hurt the most. The Commission's stated purpose for considering changing its rules is to eliminate supposed abuses, but the Commission does not set forth to what extent its policies may have been abused. Nor does the Commission state to what extent its other powers and policies have been utilized to combat the perceived problem. The Commission refers to comments filed in an earlier phase of this rulemaking proceeding. Those comments, however, were filed before the Commission's

⁹See various budget bills enacting such provisions.

revised rules had taken effect. Indeed, it is still too early to gauge the full effect of the revisions made in 1990 because there has not been time for the full cycle of application, hearing, appeals, settlement (if any), assignment (if any) and construction of station for allotments opened after the 1990 and 1991 revisions took effect.

Moreover, because any rule that limits flexibility impacts directly on available capital, and minority entities almost always face extra-burdens raising capital, establishment of any additional restrictions on the assignability of permits or licenses would be violative of the Congressional mandate for the Commission not to diminish, or spend funds diminishing, the minority preference as it has existed. The existing rule requiring that permits obtained through final hearing decisions based on minority preferences be held for one year after operation is commenced is deterrent enough¹⁰ to satisfy any legitimate needs of the Commission. There is no need for a three year rule.

IX. IF ANY NEW HOLDING RULE IS ADOPTED, IT MUST NOT AFFECT EXISTING PERMITTEES OR APPLICANTS.

At the least, it takes several years for an application for a construction permit for a new station to work through the processing line, comparative hearing and the appeals that almost certainly follow. The fully litigated new major market

¹⁰If a deterrent is justified at all and has any impact on the perceived abuses of the hearing processes.

permit is rarely "Final" within five years from the date on which the applications were due. Most such proceedings take nearly ten years. Some take significantly longer. Although many applications filed since 1990 have been disposed of much more speedily than were their predecessors, there still are a significant number of applications in litigation that were filed before the 1990 rule changes. These litigants have seen the rules by which they litigate, under which they might settle, and by which the victor will be selected change a number of times. Many of these changes have been significant.¹¹ Some of the changes have been beyond the control of the Commission.¹² Others have occurred through the Commission's exercise of control. But whatever the cause, change itself, or the potential for change, works to protract litigation over station permits. As long as the criteria might change, those with only nominal hopes of winning under today's criteria may continue to litigate (often at the "get by level") in hopes of future changes. They should not be rewarded.

Worse, the Commission should not penalize today (with additional restrictions on permittees) the applicants that have stayed the course for years through complex, and expensive, litigation. The Commission's stated reason of

¹¹For example, consider the chagrin of the attorneys who may have advised applicants that they could not win because the applicants' proposed integrated owners were male and the competing applicants were female. When the female preference was relegated to history, the comparative posture of many cases changed. *See e.g. Swan Broadcasting Company*.

¹²*See e.g.* the preceding footnote.

detering speculative applications in the future would in no way be furthered by *ex post facto* applying additional restrictions on permits to be issued in the future (or recent past) based on applications filed years ago.

X. IF ANY NEW RULE IS ADOPTED, IT MUST NOT AFFECT THOSE WHO OBTAIN PERMITS BY SETTLEMENT.

The Commission has often stated that the public interest is served by settlements of comparative broadcast hearings. Indeed, if all hearings were litigated to the end, service would be delayed for many additional years in most communities. When the Commission is presented a settlement, it and the public become the beneficiaries of a lot of time and expense that the private parties have been put to for the settlement to be achieved. The station can start operations a lot sooner, so the public gets an additional service at an early date. The Commission and the Courts, particularly the Commission with its many hats,¹³ are saved from a lot of litigation. This real savings in dollars to the government coupled with the intangible benefits of early initiation of service more than off set any theoretical disservice to the public interest that might result from the Commission not adopting additional restrictions on the assignment and transfer of permits. The slightly increased freedom to make decisions in the future that those who obtain permits through settlement have must not be reduced. The existing

¹³*i.e.* the Mass Media Bureau Hearing Branch staff; the Administrative Law Judges, the Review Board and the Commission; and, the General Counsel's Office all are involved in various phases of the process. Sometimes several are involved at once.

advantages of settlement are small enough in many cases. They should not be diminished.

XI. CONCLUSION: THE COMMISSION SHOULD NOT ADOPT THE PROPOSED THREE YEAR RULE AND NO RULE SHOULD AFFECT PERMITS OBTAINED THROUGH SETTLEMENTS.

The Commission should not adopt a three year holding rule. The Comments in the earlier phase of this proceeding pre-date the effectiveness of the revised rules crafted by the Commission in 1990 and 1991. Indeed, only now are cases moving through the hearing procedures that are based on post 1991 applications. Since the limitation on settlement pay-offs included in the earlier rules was adopted to eliminate abuses that the Commission perceived were occurring, there is no reason to adopt additional rules now, without an adequate measure of the effectiveness of the earlier rules. Assuming that the Commission believes that government should impose as few restrictions as possible on its citizens, the Commission should wait until it has adequate experience with its present rules to adopt further changes. The Commission eliminated its previous three year holding rule for all stations, resulting in substantially increased availability of capital to broadcasters. Re-adoption by the Commission of a three year rule applicable to all stations would devastate capital markets for all stations. That would be bad. Adoption of a three year rule affecting only new stations would relegate new stations to second class status. That would be even worse. Any source of capital

that operates under an economical model will always take the course of least risk for a given return. With the imposition of a three year holding rule on permittees, capital sources would be tied into the deal for at least three years. On the other hand, if existing stations may be freely assigned, capital sources are not so constrained. Only foolish capital sources would fund start-up stations and be locked in for three years when they could invest in or loan to non-restricted competing stations. The result would be that only the wealthy, who could "self finance" a start-up station need apply because others will not be able to get the capital needed to construct and initially operate.

It is well known to the Commission and the Government generally that minority enterprises in have more difficulty raising capital than do non-minority enterprises. The capital diversion to established stations that these proposals portend threatens to completely "dry up" capital markets for start-up stations, particularly those owned by minorities.

The Commission's minority preferences will be reduced to mere legal legerdemain, at best [sure, minorities get preferences at the F.C.C. but if you claim one you must hold the station for three years, making it impossible to finance] if the proposed rules are adopted.

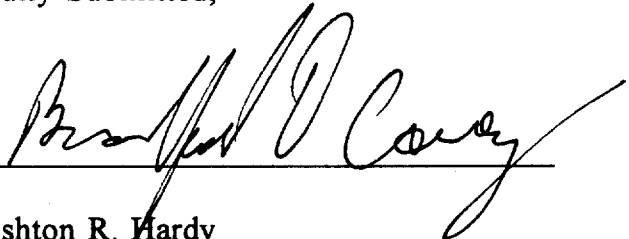
Because of the substantial negative impact on minorities, the proposed rules undercut the minority preferences that the Congress of the United States of America requires the Commission to maintain. This proceeding itself may well

violate the Congressional Budget Acts that prohibit the F.C.C. from spending any funds to remove or alter its previous minority preferences. In any event, they are unneeded, unjustified, counterproductive and would work severe damage to the Commission's programs to increase minority participation in broadcasting. If the Commission determines to adopt these rules, particularly one impacting permittees who obtained their permits by settlement, it ought to vote to abandon its small business and minority programs at the same time. To do otherwise would be hypocritical.

Wherefore, Tucker urges the Commission to **TERMINATE** this proceeding without enacting any additional rules or restrictions.

Respectfully Submitted,

By: _____


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September 15, 1993